

DONALD PAY

IBLA 82-654

Decided October 21, 1982

Appeal from decision of the Wyoming State Office, Bureau of Land Management, which granted rights-of-way over Federal land. W-47191.

Dismissed.

1. Administrative Authority: Generally -- Appeals -- Public Lands:
Administration -- Rules of Practice: Appeals: Generally

The Board of Land Appeals must defer to the Secretary's decision to approve the granting of a contract, where such approval implicitly ratifies the entire process which led up to issuance of the contract itself, including compliance with the National Environmental Protection Act of 1969, 42 U.S.C. §§ 4321-4361 (1976). The Board has no jurisdictional authority to entertain appeals concerning matters covered by the Secretarial action except in the limited circumstance where the appellant's object clearly is to show BLM's noncompliance therewith.

APPEARANCES: Donald Pay, pro se; George U. Carneal, Esq., and David J. Hayes, Esq., Washington, D.C., and William E. Linsenbard, Esq., San Francisco, California, for Energy Transportation Systems, Inc.; Gary L. Bohlke, Esq., Assistant Solicitor, and Robert E. Willis, Esq., Office of the Solicitor, U.S. Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On March 25, 1982, Donald Pay appealed a decision of the Wyoming State Director, Bureau of Land Management (BLM), which granted rights-of-way to Energy Transportation Systems, Inc. (ETSI) to cross Federal lands in Wyoming for the purpose of constructing and operating a coal slurry pipeline to

transport coal from northeastern Wyoming to powerplants in Oklahoma, Arkansas, and Louisiana. The BLM record of decision was dated January 14, 1982, and the right-of-way grant was issued as of February 23, 1982.

The record of decision noted efforts undertaken to ensure compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976), and states as follows:

A Final Environmental Impact Statement (FEIS) was prepared and filed by the Bureau of Land Management in July of 1981. The proposed action analyzed in the EIS is to construct and operate a coal slurry transportation system consisting of four major operation facilities; (1) coal slurry preparation plants, (2) water supply system, (3) coal slurry pipeline and pump stations, and (4) coal slurry dewatering plants. This proposed action and the alternatives are described in detail in the FEIS.

The record of decision notes that ETSI submitted a revised project proposal description which incorporated many of the environmentally preferable alternatives analyzed in the EIS and further stated that:

An agreement has been reached with the State of South Dakota to contract with ETSI for 50,000 acre-feet annually of water from Lake Oahe, although water permit approval from the State of South Dakota is still pending. Additionally, to meet the requirements associated with withdrawing water from a Federal reservoir, a water service contract (for storage and regulation) is being negotiated with the Bureau of Reclamation.

The BLM record of decision contains a section which sets forth alternatives which were analyzed in the FEIS. A subsection deals with water source alternatives and reads as follows:

a. Crook County Well Field Alternative - Under this alternative, the primary water source would be a well field in Crook County, Wyoming which would draw water from the Madison Formation.

b. Combined Well Field Alternative - Under this alternative, half the water source would come from each of the Niobrara and Crook County well fields.

c. Oahe Alternative - Under this alternative, two separate contracts would be utilized by ETSI to acquire water for use in the slurry process. The system would have the capability to deliver approximately 20,000 acre-feet of water annually to the slurry preparation plants in Wyoming and an additional 5,000 acre-feet of water annually for use by South Dakota communities along the route. These communities would have to negotiate the required water permits and service contracts with the appropriate state and federal agencies.

Water permit approval by the State of South Dakota would be required for use in the slurry system. In addition, a water service contract (for storage and regulation) would be required with the Bureau of Reclamation to withdraw water from Lake Oahe.

The pipeline would be from 30 to 34 inches in diameter and approximately 280 miles long. It would originate approximately ten miles northwest of the Oahe Dam and terminate at the Thunder Basin preparation plant where water would be redistributed to other preparation plants.

d. Treated Wastewater Alternative - Treated wastewater would be gathered from municipal and other treatment facilities in South Dakota and transported by pipeline to the preparation plant sites.

Under environmentally preferable alternatives the record of decision states:

Use of Oahe Water. This alternative would negate significant impacts to ground and surface waters and to social and economic systems that could result from the use of pumped ground water as the primary source. While certain temporary impacts would occur from the construction of the Oahe water system, these would be offset by reduction of the long-term social and hydrologic impacts associated with the use of ground water.

Reasons were listed in the record of decision as to why other alternatives were not preferred as follows:

Niobrara County Well Field and Gillette Well Field portion of the proposed action, Crook County Well Field alternative, and Combined Well Field Alternative. Each of these alternatives would result in significant impact to the Madison and Inyan Kara aquifers including major drawdown of the aquifers and reduction of surface flows of streams and springs.

Treated Wastewater Alternative. This alternative would result in reduction of stream flows ranging from 1.3 cfs to 12.4 cfs in four different South Dakota streams.

In his statement of reasons for appeal Pay asks reversal of the BLM decision because BLM failed to consider and analyze, under NEPA, both: alternative routings of the West River Aquaduct (WRA), which is that portion of ETSI's project needed to transport water from the Oahe Reservoir to ETSI's facilities in Wyoming; and important environmental and socio-economic ramifications of the construction and operation of the WRA. In the statement, Pay requests that a supplemental environmental impact statement (EIS) be written to analyze the environmental and socio-economic impacts of alternative routings of the WRA; that the EIS comply with the requirements of NEPA; and that the decision to grant a right-of-way to ETSI be delayed until the requirements of NEPA are fulfilled.

Section 102(2) of NEPA provides in pertinent part as follows:

The Congress authorizes and directs that, to the fullest extent possible . . .
(2) all agencies of the Federal Government shall --

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * * * *

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

In BLM's answer to the statement of reasons a brief summation of events leading to the BLM record of decision was provided as follows:

Following its designation as lead agency responsible for the preparation of the EIS, BLM began to assimilate all the information necessary to prepare the draft environmental impact statement (DEIS). This included meetings with private and public officials, research into the different environmental disciplines represented in the DEIS, public hearings, and the study of numerous documents and technical reports.

On November 7, 1980, the DEIS was published (Exhibit B) together with a request for written comments to be submitted by January 6, 1981, thus giving all interested persons 60 days within which to make written comments. The appellant herein [Donald Pay] submitted written comments. (See 40 C.F.R.

1506.10(c)). The CEQ [Council on Environmental Quality] regulations require only a 45 day comment period. Public hearings on the draft EIS took place between December 1, 1980 and December 17, 1980, in Louisiana, Arkansas, Oklahoma, Kansas, Colorado, Nebraska, South Dakota (2 sites) and Wyoming; 980 persons attended the public hearings and 161 individuals presented their views.

Following a review and consideration of all the information supplied through written comments and the public hearings appropriate changes were made, and an FEIS [final environmental impact statement], was published on July 17, 1981. (Exhibit C). Thereafter, a 30 day comment period on the FEIS from July 17, 1981, to August 15, 1981, further permitted public comment prior to any final decision.

While the Federal EIS process was underway, the State of South Dakota prepared a draft EIS (Exhibit D) pursuant to the South Dakota Environmental Policy Act (SDCL 34A-9) on ETSI's water right application filed with the State's Water Management Board. The State's DEIS was never formally issued by the State of South Dakota but it was made available to the public by BLM. It was relied upon by BLM in the preparation of the Federal EIS and was incorporated in the FEIS by reference. It was cited at page R-23 in the Federal FEIS with a note that it was available at the BLM State Office in Denver, Colorado.

BLM's Answer at 3-4.

In its answer, BLM asserts that Pay has not shown that he is a party adversely affected by BLM's issuance of the rights-of-way since there is a question as to the State where Pay resides, and because he has not shown that he is in any way connected with the project or its location. BLM further asserts that Pay is estopped from raising the issue that alternative routings for the WRA should now be analyzed in a new or supplemental EIS because Pay failed to raise that issue at any of the earlier stages of the NEPA process, although he did submit written comments on the DEIS. As to the substantive issues, BLM notes that the EIS examined various water source alternatives and that NEPA only requires that alternatives to a proposed action be considered. Should Pay's arguments be accepted, BLM feels that a situation will result where "alternatives to alternatives" will be required to be considered which would be a situation far beyond anything contemplated by NEPA. Further, BLM notes that the State of South Dakota had already prepared a DEIS, which was incorporated by reference into the Federal EIS, which took into consideration nine alternative routes that would best serve communities along the route of the water pipeline. BLM contends that to require consideration of "alternatives to alternatives" that had already been treated in a DEIS prepared by the State is unreasonable." Finally, BLM contends that there is no requirement in NEPA that an EIS must cover non-Federal actions which are not specifically proposed but which are only expectations as are the "lateral distribution pipelines and treatment facilities."

In its answer to the statement of reasons for appeal, ETSI asserts that the FEIS addresses all material aspects of the pipeline project fully satisfying all statutory and regulatory requirements; that the FEIS was not required to discuss exhaustively various potential routings associated with an alternative water source for the project; that the pipeline route was preferred by the State of South Dakota; and that Pay cannot now complain that the FEIS is allegedly inadequate for reasons he failed to mention during the comment period and hearings which resulted in issuance of the FEIS.

On June 29, 1982, the Secretary of the Interior signed and approved a memorandum from the Commissioner, Bureau of Reclamation, which dealt with the proposed water service contract for the ETSI Pipeline Project for the use of 20,000 acre-feet of Lake Oahe water annually in a coal slurry project. That memorandum reads in part as follows:

1. Introduction: Attached for your consideration and approval as to form is the proposed water service contract for 20,000 acre-feet of water service with the ETSI Pipeline Project, A Joint Venture (ETSI). ETSI's plan involves pumping water from Lake Oahe in South Dakota and transporting it by pipeline to a point near Gillette, Wyoming, mixing the water with coal mined in the Gillette area, and then transporting the slurry by pipeline to the middle Southern States for use in coal-fired, steam-electric generating facilities. The proposed contract has been prepared pursuant to Reclamation law, particularly section 9(c)(2) of the Reclamation Project Act of 1939 (53 Stat. 1187), and the Flood Control Act of 1944 (58 Stat. 887). Also attached are a copy of the Record of Decision signed by the Regional Director, Billings, Montana, and a fact sheet setting forth pertinent information concerning the proposed contract.

2. Environmental Considerations and Public Participation: Because ETSI's proposed coal slurry pipeline project involves crossing access on some 36 sections of federally owned lands in Wyoming, the Bureau of Land Management (BLM), was designated as the lead Federal agency for National Environmental Policy Act (NEPA) compliance. BLM completed its final environmental statement (FES 81-26) in July of 1981. A public comment period of 60 days was allowed and on January 14, 1982, BLM determined that NEPA compliance was complete and approved the ETSI project.

FES 81-26 was prepared based on the use of ground water from the Madison Formation as the primary water supply for the project. Water from Lake Oahe was identified as an alternative supply. Because of the potential impact (drawdown) on ground water from the Madison Formation and the opposition to the use of the water, ETSI selected Lake Oahe as its preferred water supply. The Bureau of Reclamation adopted BLM's FES 81-26 as an adequate site-specific environmental evaluation for the proposed water service contract action. Notification of this adoption

was made in the Federal Register publication of October 23, 1981, which also announced the intent to begin contract negotiations with ETSI for water service from Lake Oahe. ^{1/} The 1977 comprehensive environmental impact statement "Water for Energy -- Missouri River Reservoirs" (FES 77-43), detailing our overall water marketing program, covers the cumulative environmental effects, and FES 81-26 evaluates the specific ETSI project. We believe these studies constitute adequate NEPA compliance for the ETSI project.

The Environmental Assessment and Finding of No Significant Impact dated June 10, 1982, and signed by Colonel V. D. Stipo, District Engineer, Corps of Engineers, covering the proposed issuance of Department of the Army permits to ETSI under section 10 of the River and Harbor Act and Section 404 of the Clean Water Act, for construction of a water intake structure in Lake Oahe, Missouri River mile 1081.50R, are enclosed as additional NEPA compliance documentation for your consideration. To the extent that the overall analysis of impacts contained in the environmental assessment is relevant to the impacts associated with this proposed contract, it is adopted as updated and supplemental information to FES 77-43 and FES 81-26.

The Corps of Engineers' environmental assessment covers ETSI's application for an intake structure capable of pumping 54,300 acre-feet per year; however, it should be noted that the Bureau of Reclamation's proposed contract is for 20,000 acre-feet per year only and while the intake structure can ultimately handle more than 20,000 acre-feet per year, additional NEPA compliance by the Bureau of Reclamation would be required before it could enter into contracts for additional water for industrial use by ETSI. The Corps' environmental assessment concludes that neither the site-specific or downstream impacts of the Corps'

^{1/} The Oct. 23, 1981, Federal Register publication, 46 FR 52040, discussed the process which led up to adoption of the FEIS and provides as follows:

"The Bureau of Land Management has prepared a draft and a final environmental impact statement (Int. FEIS 81-26) on the ETSI coal slurry pipeline transportation project. The FEIS was filed with the Environmental Protection Agency on July 9, 1981, and the waiting period which began on July 17, 1981, was extended for another 30 days through September 16, 1981. ETSI had planned to utilize groundwater from a well field, tapping the Madison Formation near Lusk, Wyoming, however, Lake Oahe was identified as the alternate backup water source in the FEIS. The newly enacted South Dakota legislation, which will enable ETSI to obtain water rights from the Missouri River, will foreclose the Madison Formation as a principal water source for ETSI.

"The FEIS is considered adequate to cover the proposed water service contract and that FEIS covering the use of 20,000 acre-feet of water is hereby adopted by the Bureau of Reclamation for its compliance pursuant to the National Environmental Policy Act of 1969 for the proposed contract."

actions are significant. Also, enclosed for your use and consideration are the Findings of Fact made by the Corps concerning the ETSI permit.

* * * * *

We believe the 1977 environmental study, the more recent BLM environmental statement, and the Corps' [Corps of Engineers] environmental assessment and Finding of No Significant Impact adequately cover the cumulative and site-specific environmental impacts associated with the proposed water use. We believe that there is no justification to deny the project because of adverse environmental effects. The concerns voiced by the railroad interests, and the Lower Basin States, are primarily political and social and need to be considered in light of the Upper Basin State interests. For example, South Dakota gave up in excess of 500,000 acres for the construction of the main-stem dams and reservoirs and has received none of the Federal irrigation development proposed to utilize storage water from these reservoirs. A contract provision that makes ETSI's rights to the use of water subservient to adjudicated water rights of the Indian Tribes in the area should adequately protect the interests of the Indian people.

* * * * *

6. Findings and Recommendations: All prerequisites required to allow the water delivery to ETSI to proceed under South Dakota law have been completed. The Governor of South Dakota, the South Dakota Legislature, and water users who stand to benefit from water deliveries in western South Dakota are solidly behind the proposed contract action. Review of the proposed contract in behalf of the Department of Energy was made by the Area Manager, Western Area Power Administration, Billings, Montana. The Secretary of the Army has been advised of the proposed contract so that the Corps of Engineers can retain operational and managerial control over the reservoir. Approval of the proposed contract will not be without public controversy. Opposition from the railroad interests, Indian tribes, States downstream of South Dakota, and certain environmental and special interest groups has been expressed and such expressions are expected to continue.

We believe the proposed contract is in the mutual best interests of the United States, the State of South Dakota, and ETSI, and we recommend that you approve the form of contract designated "UM Draft, Revised 3-3-82," with the understanding that minor contract revisions can be made, as necessary, to complete the contract for execution. Thereafter, pursuant to existing delegations of authority and after execution by ETSI officials, the Regional Director, Upper Missouri Region, will execute the contract in behalf of the United States and serve as contracting officer.

On July 8, 1982, ETSI filed a motion to dismiss the entire appeal. As grounds for the motion ETSI cites the June 29, 1982, approval by the Secretary of the proposed water service contract with ETSI. Citing 43 CFR 4.1, 4.5(a), and 4.10, ETSI states that where the Secretary has rendered a decision, the Office of Hearings and Appeals lacks jurisdiction to review the same question. ETSI contends that the Secretary's approval constitutes a decision that the "programmatic and project specific environmental review fully comports with NEPA"; that "[t]he Secretary's decision constitutes final agency action regarding the legal sufficiency of the analysis of the Oahe water alternative in the impact statement"; and that, accordingly, this Board has no jurisdiction to entertain this appeal.

On July 16, 1982, Pay filed an answer to ETSI's motion to dismiss the appeal stating that his reasons for appeal were directed at the insufficiency of the FEIS in analyzing the complete water delivery system, not limited to the source of water. He states further that:

The water delivery system includes (a) the source of water, (b) the facilities to intake and pump the water, (c) the facilities to transport the water, (d) ancillary facilities to operate and control the operation (including microwave towers and electrical lines), (e) lateral lines and treatment facilities, (f) water storage facilities at the end of the aquaduct, and (g) any right-of-way required for the above facilities.

Pay contends that the Secretary has not ruled on the sufficiency of the FEIS regarding the water source, but if such is found to be so, the ruling only concerns one narrow issue and is not dispositive of the issues raised by the appeal. Pay further requested a hearing concerning the matter.

On July 23, 1982, ETSI filed an opposition to the request for a hearing, stating that no factual issues are in dispute, and a reply to Pay's opposition to ETSI's motion to dismiss. ETSI contends that because approval of the water service contract involved a major Federal action, the Secretary was required to evaluate and weigh the environmental impacts of the action, and as such the Secretary could not limit environmental review to the relatively narrow question of the environmental effects associated with the withdrawal of water from the Oahe reservoir, rather, the Secretary was required to consider the environmental effects associated with the proposed use of the water in the project as a whole.

On August 10, 1982, certain parties filed a petition to intervene and requested an immediate stay of the rights-of-way grant. The parties include the Kansas City Southern Railway Company, the Sierra Club, the Rocky Mountain Farmers Union, the Iowa Farmers Union, and the Nebraska Farmers Union. The groups seeking to intervene contend that it was unnecessary for them to appeal the final decision which granted the rights-of-way to ETSI; that disposition of this appeal may impair the ability of the petitioners to protect their interests; and that absent their participation in this proceeding their interests will not adequately be represented by the existing parties to the controversy.

ETSI subsequently filed an opposition to the petition to intervene and request for stay, as did BLM. Among other considerations, both ETSI and BLM contend that 43 CFR 4.411 2/ bars the groups seeking intervention. ETSI and BLM point out that counsel for petitioners received a letter from BLM dated

February 23, 1982, which notified counsel of the decision to issue the right-of-way on that date, and that the letter stated "[i]f you wish to appeal the issuance of the right-of-way grant, you should follow the prescribed procedures below." (Petitioners' Exh. B). Because of our disposition of this appeal, we need not rule on the petition to intervene.

[1] In Susan Delles, 66 IBLA 407, 409 (1982), we held that

[t]he Board of Land Appeals has no jurisdiction over appeals from decisions which have been approved by the Secretary of the Interior. 43 CFR 4.410. 3/ Similarly, where a Secretarial order is the basis for action by an agency of this Department, the Board will only review the case for the purpose of deciding whether the order was properly applied and implemented.

See also Dolores M. Lisman, 67 IBLA 72, 74 (1982).

Appellant contends that the June 29, 1982, memorandum must be strictly construed as merely an approval of the form of the water service contract. We disagree. The memorandum states that referenced studies constituting adequate NEPA compliance for the ETSI project, and other enclosures to the memorandum were included for the Secretary's use and consideration, and as additional NEPA compliance documentation. The Secretary's approval of the contract includes approval of the process which led up to formation of the contract. Compliance with NEPA is an indispensable part of that process. See Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972). We cannot construe so narrowly the approval of the Secretary as to limit it merely to withdrawal of the water. Clearly withdrawal is for the purpose of transmission to the preparation plant in Wyoming. Certainly approval must relate to the entire water delivery system.

In effect, in the present situation the Secretary of the Interior had approved a decision which is the subject of this appeal. Although Pay does not challenge the entire ETSI coal slurry pipeline project but merely NEPA compliance as regards that portion which will bring water from Lake Oahe to the main pipeline, the Secretary's approval of the contract outlined in the June 29, 1982, memorandum includes approval of the process which led up to formation of the contract. NEPA compliance, as an indispensable part of

2/ 43 CFR 4.411 requires that a notice of appeal be filed within 30 days "after the person taking the appeal is served with the decision from which he is appealing."

3/ 43 CFR 4.410 provides:

"Except as otherwise provided in Group 2400 of Chapter II of this title, except to the extent that decisions of Bureau of Land Management officers must first be appealed to an administrative law judge under § 4.470 and Part 4100 of this title, and except where a decision has been approved by the Secretary, any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge, shall have a right to appeal to the Board." (Emphasis added.)

that process, thus also was approved by the Secretary. Accordingly, since the decision allowing use of water from Lake Oahe for delivery to the ETSI pipeline project was approved by the Secretary, this Board has no jurisdiction to entertain an appeal concerning that decision. For that reason, we need not discuss other issues raised in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

